

HUD's Multifamily Accelerated Processing or MAP Guide Industry Briefing, Session 5, 3/17/21

John Panetti: Thank you for joining session 5 of HUD's multifamily accelerated processing or MAP Guide industry briefings. My name is John Panetti from ICF and I'll be your host today. This webinar and recording will be made available on the HUD exchange. Participants are in listen only mode and are muted on entry. Please submit any content or technical related questions in the Q&A box on the right-hand side of your screen.

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Our HUD presenters today are as follows: Sara Jensen, office program environmental clearance officer, and Nancy E. Boone, federal preservation officer at the Office of Environment and Energy. I'd like to go ahead and turn it over to Sara Jensen.

Sara Jensen: Thanks so much, John. Today, we're going to talk about a new delegation that allows FHA lenders and their authorized representatives to initiate consultations with state historic preservation officers. We'll be using the acronym, "SHPOs" in certain circumstances. Let me add my welcome to John. In addition to lenders, consultants and HUD staff, we are joined by many state historic preservation officers and tribal representatives today. Welcome all.

Here's our agenda for today. We'll give a short background on the delegation memo, discuss when it applies, walk through the delegation of authority and what it allows and requires, explain how this process will work for lenders and third parties, discuss existing no potential to cause effect memos and programmatic agreements, and then end with time for questions. So there's a lot to cover. So let's go straight to the background.

So HUD completes environmental reviews for multifamily and health care FHA applications under the regulations at 24 CFR Part 50 using the HUD Environmental Review Online System, or HEROS. For new construction, refinance projects that are new to HUD's portfolio, or any refinance that includes rehab, the environmental review includes a list of laws and authorities, including Section 106 historic preservation.

The consultation requirements under Section 106 do not always align with the tight FHA processing timeframes, and therefore FHA lenders have long requested the ability to initiate consultation with SHPOs earlier in the process. And in fact, in practice, some SHPOs have

accepted consultation requests from lenders and consultants. But this approach has been informal, inconsistent, and had mixed results.

Over the last two years, housing worked with the Office of Environment and Energy on a delegation memo to authorize lenders and their authorized representatives to initiate consultation with SHPOs in certain circumstances. This delegation does not extend to consultation with tribes. Consultation with tribes will continue to be conducted by HUD staff. Our goal is to create a consistent path for all projects in all states, give clear guidance for what can and cannot be delegated and how consultations should be conducted, and allow more time for Section 106 review.

I'm now going to pass to Nancy. And in case you arrived late, this is Nancy Boone, HUD's federal preservation officer, to give a short overview of the National Historic Preservation Act. Nancy?

Nancy Boone: Thank you, Sara. Today's webinar focuses on Section 106 historic preservation review and the new role that lenders may play in the process if they choose to use the delegation. So we'd like to just go through a little bit of background and context before we get into the delegation itself.

So as you know, the National Historic Preservation Act requires federal agencies to consider the impact of their projects on historic properties. The act has been around since 1966 and Section 106 gets its name from the original section in the Act.

It applies to undertakings with federal assistance, permanent license or approval. And in the case of housing, multifamily and health care programs, undertakings include financing and refinancing and any associated acquisition in construction, rehabilitation, or demolition. The regulations for Section 106 are found at 36 CFR 800. HUD has adopted both the Act and the regulations in 24 CFR 50.4(a) and the regulations and requirements are also found in the MAP Guide in Chapter 9.64 and in the 232 Handbook Section 75€.

For a full presentation on Section 106 process, we refer you to the previous webinar for FHA lenders that Housing presented in July. Hopefully you all attended, but if not, or if you want to see it again, it's archived at the link that you see here. If a lender uses a delegation to conduct Section 106 review in a project, they're responsible for meeting the requirements and regulations and HUD guidelines for Section 106.

So it's important to have a good grounding in what the process is. There are many other resources on HUD exchange and we will get to some links for those later on. There's a lot of training that you can take advantage of. This is a chart of the 106 process, you've probably seen it before in previous training. It's a four-step process.

And to quickly review before we get to discussing the delegation memo, just a couple of steps. In the first step in the process, you develop a good project description, check to see if, for instance, there's no potential to cause effects memo that applies, and identify consulting parties, including tribes. In the second step, you define the area that will be affected by the project, the area of

potential effect, or the APE, which often is the project site and sometimes extends into the surrounding area that may be indirectly affected by the project.

If there are historic properties, then the third step of the process is to assess what the effect of the project is on the property, and if that effect is going to be adverse, then the consultation continues to avoid, minimize, or mitigate any adverse effects. Notice that throughout the whole process, on the left-hand side of the chart here, consulting parties are mentioned.

So if the process is set up to protect historic properties, what exactly is a historic property? If any prehistoric or historic district site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places? That phrase "eligible for" is very important because there are many properties out there that may be eligible and may meet the national register criteria, but they have not been evaluated yet.

The term includes artifacts, records and remains that are related to and located within such properties, and very importantly, the term includes properties of traditional religious and cultural importance to Indian tribes or native Hawaiian organizations.

I mentioned consulting parties. You see a list here and some of these parties are required in every section 106 consultation and others may participate sometimes and sometimes not. So looking at the list, the HUD official, as defined in the Section 106 regulations in our case here for our discussion is the HUD Office of Housing.

The state historic preservation officer in the state where the project is occurring involves -- is involved in the process and in concurs in the final result or objects to the final result. Applicants are involved in the process, and in this case, it's the lender who is the applicant for FHA financing, so they are in the role of the applicant.

Federally recognized Indian tribes and native Hawaiian organizations may be consulting parties, tribal historic preservation officers. Local governments can be consulting parties. And then, more broadly, organizations with demonstrated interest because of their legal or economic relation to the project or their concern for the effects of the project. They may participate, as well as the public.

And there are some instances where the Advisory Council on Historic Preservation, which administers the Section 106 regulations, some instances where they may also participate directly in a review.

Currently, HUD takes the following steps to review and FHA Project. HUD determines if any of the following applies: a no potential affects memo, which I mentioned, which basically exempts from further consideration a particular group of projects. There may be a situation where project activities do not exceed maintenance, which is exempt by regulation, in HUD regulation. Or there may be activities that are included in a programmatic agreement. And we'll discuss all three of those options later on.

But if those things may apply then the following standard process would not be necessary. But if those do not apply, HUD conducts full Section 106 review and makes one of three possible findings. No historic properties affected, no adverse effect or adverse effect. And if there's an adverse effect, it must be resolved through consultation to again avoid, minimize or mitigate the adverse effect.

So we want to focus today on HUD's delegation to FHA lenders to conduct and initiate Section 106 in certain circumstances. Section 106 regulations created by the Advisory Council on Historic Preservation allow an agency to authorize an applicant or a group of applicants to initiate and conduct Section 106 review. And here you see the citation on the screen.

An agency must, if they're going to use this delegation, notify state historic preservation officers and tribal historic preservation officers. If the agency decides to use this delegation to another group of applicants, then they must conduct consultation with Indian tribes. That cannot be delegated, that can never be delegated, HUD must do consultations, even in the case of delegations to the lender.

So delegations of authority to initiate consultation are very rarely used at HUD. I've been at HUD, we've issued maybe one or two. They're issued by the director of the Office of Environment and Energy, who serves as the environmental clearance officer for the department. So in this case, we are issuing a delegation of authority for lenders and their authorized representatives to initiate Section 106 in certain circumstances, and we refer to that delegation as the delegation memo.

We notified SHPOs and THPOs on February 17th and followed up with a meeting with them on Teams on March 5th. If lenders are using the delegation, they need to provide a copy of the delegation memo with their consultation request to SHPO. And that memo must also include contact information for the lender and consultant and reference to which FHA program is being used. I'd now like to turn it over to Sara for some overall information on the delegation memo.

Sara Jensen: Thanks so much, Nancy, for that overview. I'm going to talk about some more details about this specific delegation memo. First, lenders choose whether to use it for each application. If the lender does not use the delegation memo, then HUD staff will initiate consultation with the SHPO. When lenders use the delegation memo, they must follow the requirements of the memo and the MAP and 232 guidance regarding its implementation.

And as Nancy and I both have already mentioned, the delegation does not extend to tribal consultation. Only HUD may conduct consultation with tribes and native Hawaiian organizations. Here's a screenshot of the delegation memo. A draft version of this was included in the December 18th MAP Guide posting. And the final draft -- the final signed draft will be posted for use shortly.

The memo applies to MAP and Office of Health Care program approved lenders and authorized representatives and only to the FHA programs listed in the delegation memo. It does not apply to the FHA risk-share program, which is under Part 58. It does not apply to other housing programs such as RAD or asset management programs like Section 89 renewals with capital repairs or

8BB transfers, unless those are combined with FHA. And it does not apply to other HUD program areas like programs in public housing or CPD.

Here is the list of programs that are covered by the delegation memo. You can see that 223(a)(7) is on the list. And I just want to note that you should follow MAP and 232 handbook guidance on the correct level of review for 223(a)(7). For MAP, this will always be categorically excluded, not subject to. For 232, it could be categorically excluded, subject to, and therefore require consultation.

And as always, the environmental review must cover all components of the project, including repairs, rehab, and demolition.

The memo goes into effect tomorrow, March 18th. As Nancy noted earlier, you must include a copy of the final signed delegation memo when you write to a SHPO. This will be posted as soon as possible. The implementation guidance is in the 2020 MAP Guide for multifamily projects, and in an upcoming lean thinking blast for health care projects, which will direct lenders to follow 9.6.4 of the MAP Guide until the 232 handbook updates are complete.

The delegation member allows consultation to begin when HUD issues an FHA number. The FHA number marks the very earliest point of consultation. Practically, you will need to gather documentation about the project and historic resources before you can proceed. And we're going to talk about that shortly. The delegation memo requires some actions to use a qualified historic preservation professional. For example, demolition of a building over a 45 years old, new construction in or adjacent to a listed or eligible historic district, substantial ground disturbance, and exterior rehab of a building over 45 years old. I'm going to turn back to Nancy to provide some details and examples. Nancy?

Nancy Boone: Thank you, Sara. So Section 106 requires decisions about, for instance, which properties national register criteria and assess whether projects have adverse effects on historic properties. These Section 106 findings must meet professional preservation standards. And the delegation memo requires that qualified professionals be involved in some projects to make those findings.

A consultant who is qualified as a historic preservation professional meets academic and experience requirements stated in the secretary of the interior's professional qualification standards, international standards that are used extensively in budgets for historic properties. There are five areas of expertise which are outlined in the secretary's standard: archeology, architectural history, history, architecture, and historic architecture. And as I said, each field has its own academic and experience requirements.

But beyond the academic qualifications, it is advisable to also involve consultants who have expertise in identifying historic properties, evaluating facts and preparing Section 106 agreement documents. A qualified professional might be part of the environmental consulting firm that's already preparing other environmental studies for the lender, or they could be consultants who are contracted separately. I would say that having a qualified historic preservation professional on the environmental team itself can be helpful.

Here are some examples of how and when qualified professionals might assist a project. These are examples, they're not specific requirements, they're meant to illustrate some of the situations where it would be important and under the delegation might be required to include a qualified professional. So the first example, demolition of a building over 45 years old. One of the questions in that scenario is, is the building eligible for the National Register and therefore considered a historic property? That's something that an architectural historian would be qualified to do.

Or there may be a need for an archeologist to evaluate the potential for historic sites on the property that might be disturbed during the demolition. Sometimes that occurs in older, urban or industrial areas, even, where historic period archeological sites might be expected.

Another example, new construction in or adjacent to a listed or eligible historic district might require a qualified professional. So in this scenario, an architectural historian could evaluate the buildings in the vicinity of the project to determine the area of potential effects, which is one of the requirements in documentation for Section 106. An architect would likely be the one to design a compatible new building.

There may be also the need for an archeologist to evaluate what kind of land disturbance, what kind of ground disturbance is happening with the project, and is that likely to impact a potential significant archeological resource? Another role here might be the architectural historian could evaluate the effects of the architect's new design on the other properties within the APE.

In the scenario of substantial ground disturbance, an archeologist would be valuable to identify potential archeological sites on the property that would be disturbed. If there's a sense of the sensitivity of the land for archeological sites, some indication that there may be a potential for sites there, the archeologists could be involved from the beginning and you might want to have them do an initial investigation of background research to help zero in on the likelihood of sites being at the site. In other cases, the archeologists may be brought in later when consulting parties or importantly, tribes, as identified archeological concerns at the site.

Another example of a scenario when a project involves exterior rehabilitation of a building over 45 years old, what qualified professionals contribute to that undertaking? The architectural historian would determine if the building meets the National Register criteria and if so, identify what the important features of the building are that should be preserved in the rehabilitation.

And a historic architect could be involved to design the rehabilitation to meet preservation guidelines and avoid an adverse effect. There again, an architectural historian would be helpful in making that evaluation as well. An historic architect has expertise beyond an architect as defined in the secretary's professional qualification standards. They have additional expertise and direct experience with the rehabilitation of historic buildings.

The delegation memo allows lenders and their consultants to evaluate projects that have findings of no historic properties effected, or no adverse effects and seek concurrence from the SHPO to conclude Section 106. If a project has an adverse effect, HUD must enter the consultation. This

is one of the circumstances under which the delegation memo requires HUD to reenter consultation.

The other items listed here on the list are also standard provisions that are included in delegation memos done by federal agencies about other instances where, due to disagreement or objection, there needs to be the reentry of the agency official, in this case, HUD Office of Housing to resolve issues in the consultation. And we want to take a closer look at some of these provisions in a little bit more detail.

So HUD must enter consultation when the project may have an adverse effect. And an adverse effect means that the property, the historic property may be harmed through alteration or loss of historic features or setting or demolition, removal or transfer. There are preservation guidelines, the Secretary of the Interior Standards for Rehabilitation, for instance, that give guidance on how to protect and preserve historic properties and their historic features. And if a project does not meet those standards, it can be classified as an adverse effect and HUD must get involved.

HUD must also reenter consultation when there's disagreement with the SHPO or the THPO. So one example would be a lack of SHPO concurrence on identification of historic properties or evaluation of aspects of the project. When the lender and their consultant make the determination to make the findings, the SHPO does not agree, then HUD must reenter consultations.

HUD must also reenter consultation if tribes, other consulting parties, or the public object to the lender's determinations. The lenders must always consider information and comments received from tribes and consulting parties before making findings. If there are disagreements at that stage, then the lender needs to consult to resolve those disagreements and if not resolved and the parties object to the findings, HUD will need to enter and complete the consultation.

HUD also needs to enter consultation when there is possible foreclosure or anticipatory demolition. And those deserve their own slides. So foreclosure is identified here as failing to complete the requirements of Section 106 in accordance with the procedures and regulations. And that -- the option to foreclose the council's [ph] ability and opportunity to comment. In the delegation, lenders must comply with the Section 106 process and HUD cannot approve a project if the process is not properly carried out, because that would be an example of foreclosure, and the department is not going to do that.

Under circumstances where foreclosure does occur and there's an official finding of foreclosure, that can be used to oppose a project in litigation. Just stressing the importance of following all the procedures in Section 106.

HUD must also enter consultation when there may be anticipatory demolition. And here, it's almost worth reading verbatim here, but Section 110(k) of the National Historic Preservation Act says that each federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance, like financing and refinancing, mortgage insurance, to an applicant who with intent to avoid the requirements of Section 106 of the Act has intentionally, significantly, adversely affected historic property to which the grant would relate or having legal power to prevent it allowed such significant adverse effect to occur.

There is a caveat that the agency may consult with the advisory council in the case of anticipatory demolition and together agree that the assistance is still warranted.

The MAP guide reinforces this idea and gives us some practical outlines for housing programs. The MAP guide says that even before the concept meeting or application submission takes place, any action by the potential lender or borrower or any action by another party that the lender or borrower has the legal power to prevent, like for instance, the seller, which is taken with the intent to circumvent Section 106 review and that significantly adversely affects a historic property would result in rejection of the application. So this is a very serious thing to avoid. And I would just note that the 232 handbook will also include similar language.

Another example of when HUD must enter consultation is when HUD deems the consultation record inadequate. So not only is it important to follow all the regulations, but there must be an administrative record of documentation of the various steps that lead to the conclusion, the finding that is made, and that justifies that finding.

HUD will review Section 106 in HEROS and confirm that it is complete and that it does comply with the regulations and guidance, and if at that point -- and Sara will go into this a little bit later -- if at that point HUD finds the record inadequate, HUD will enter and continue consultation to resolve the inadequacies before approving the project.

That documentation record is going to look like this. The requirements are outlined in 36 CFR 800.11 and includes a description of the undertaking notifying, specifying the federal involvement, the area of potential effects. It always include photographs, drawings, maps that describe the physical nature and setting of the project. The documentation includes a description of the steps that are taken to identify historic properties and the description of those properties that will be affected, including what makes them eligible for the National Register.

A description of the undertakings' effects on historic properties, how will the project impact those historic properties? And the documentation includes an explanation of why the criteria of adverse effects either were applicable or inapplicable. Is this an adverse effect or is it not? And why? And then the record includes copies or summaries of any views provided by the consulting parties, including Indian tribes and the public. So Sara is going to talk a bit more about the process if the delegation is not used. Sara, I'll turn it back to you.

Sara Jensen: Thanks, Nancy. So yeah, you may be asking at this point what happens if a lender decides not to use a delegation memo? So the first thing is that only HUD staff can initiate consultation with the SHPO in that case. However, HUD staff will still rely on the lender and their consultant to gather all the project and historic information and draft the consultation letter.

So I got -- I am on the correct slide. Okay. This assembly can include outreach to the SHPO to help identify historic properties, but must stop short of seeking concurrence from the SHPO, which is allowed under the delegation memo. And this last bullet about preventing actions prior to completion of Section 106 applies to all lenders, whether following the delegation or not. And that is so you don't end up with an anticipatory demolition or foreclosure like Nancy just discussed.

This list of required documentation is almost exactly the same for lenders following the delegation and lenders not following the delegation. And it may look very familiar to the Section 800.11 that Nancy just posted.

In all cases, lenders need to provide a project narrative, a map with the site location and proposed area of potential effected boundaries, the list of consulting parties, including tribes from T-DOT, which is our tribal online system. Clear, I will stress, clear photos of buildings and settings, and a description of direct or indirect effect on historic properties.

The only difference is the last bullet. Under the delegation, the lender can submit a determination of effect to the SHPO. If not following the delegation, the lender would propose a determination of effect to HUD. Letters directly to the SHPO, and letters prepared for HUD to submit must follow the SHPO submission procedures or format in the particular state.

The requirements to hire a historic preservation professional and the specific scenarios listed under the delegation memo do not apply to projects not using the delegation memo. However, there are cases where hiring a qualified historic preservation professional to prepare the initial consultation and supporting documentation would be appropriate. And this statement here on the side is in both the MAP guide and the 232 handbook.

Examples include when the National Register eligibility of a property is unclear, when adverse effects are expected, when the property contains archeological sites, and when the project is controversial. The early involvement of a qualified historic preservation professional can really help the speed and ease of the consultation process. And we've mentioned a few times that this delegation memo does not apply to consultation with the tribes. Only HUD staff can consult with the tribes. Nancy will now talk a little bit about the tribal consultation process, which has not changed. Nancy?

Nancy Boone: Thank you, Sara. So as Sara said, in either case, whether a lender is using delegation or whether HUD is conducting consultation itself, HUD is the only party that can consult with tribes. So if a lender is doing the Section 106 review, they need to notify HUD when the project involves the type of activities that might affect historic properties of religious or cultural significance to tribes. We have a list of a number of examples of that which are included in a notice that HUD published in 2012 about consultation process for HUD projects. Appendix A of that notice includes some of these examples that we'll go through.

So HUD needs to consult with tribes or the lender needs to notify HUD to consult with tribes when there is significant ground disturbance in a project. So some examples would be a new sewer line, utility line above or even below-ground foundations, footings, gradings, access road. These are things which have the potential to impact belowground archeological resources if they are available on site. And in order to know whether there's a likelihood of properties there, you need to invite consultation from tribes to see if they have a concern about that particular location.

Another instance where tribal consultation would be required: work on a building with significant tribal associations. Another example, transfer of lease or sale of historic properties of

religious or cultural significance. New construction is often an area where we reach out to tribes and invite them to consult and to comment and help resolve any adverse effects. New construction in undeveloped areas is particularly sensitive because those kinds of locations and kinds of projects noted here may impact tribal resources of a ceremonial nature or of a religious nature.

So for instance, if a project involves industrial scale energy facilities or transmission lines, pipelines and recreational facilities, and if those projects are proposed for natural areas like canyons, islands, forests, native grasslands, that may have tribal significance, we need to reach out to the tribes to consult on that project and include them in their comments. If a project might introduce incongruent visual, audible, or atmospheric changes, that could also impact tribal resources of concern.

So these are these are examples of types of activities that have the potential to impact resources of tribal, religious and cultural significance and one that would require consultation in HUD-assisted projects.

The tribal consultation process does not change with delegation. It remains exactly the same. HUD conducts the consultation. The delegation does not extend to consultation with tribes or native Hawaiian organizations.

So HUD must initiate and conduct the consultation with Indian tribes or NHOs when a project contains those types of activities that might affect religious and cultural significance, which we were just pointing out in the two previous slides. A draft is supplied by the lender or consultant with the information about the project and HUD reviews and sends a letter or e-mail to tribes or NHOs inviting them to consult. And that process follows, again, HUD notice on tribal consultations BBD 12-006 and the supplemental associated memo.

Sara, do I turn it back to you on this one? No, I'm sorry.

So lenders must coordinate with HUD on HUD's consultation with Indian tribes. So this is where there has to be some back and forth, some sharing of information. The lender needs to alert HUD that consultation appears to be required. HUD needs to conduct that consultation and share the results, share the comments, share the concerns back to the lender so that those comments and concerns can be factored into the eventual finding of effect.

That circling back of information from the tribes must be taken into account before HUD or the tribe -- excuse me, HUD or a lender would submit a finding of effect to SHPO for concurrence.

Now it's time to turn it back to Sara for some additional detail on the timing of consultation.

Sara Jensen: Okay, great. So the question is, how will this coordination that Nancy just mentioned work? For health care, HUD will initiate consultation with tribes when requested via lean thinking at HUD.gov. The request must come after the FHA number is assigned and must include all the information HUD needs to start the consultation.

For multifamily projects there are two paths. For standard MAP guide projects, HUD will initiate tribal consultation when an application enters the queue. This is not automatic. You need to make the request and provide the documentation. For projects following the LIHTC Section 221(B)(4) pilot, HUD will initiate tribal consultation within five days of the concept meaning encouragement letter as outlined in notice 8/2019-03.

So I want to stress again the word "coordination." For projects that require tribal consultation, you must coordinate with HUD and get a response before making findings and seeking concurrence from a SHPO. For projects that meet the criteria Nancy just discussed, and do not require tribal consultation, there is no requirement for early coordination with HUD and lenders and consultants can proceed any time after receiving the FHA number.

And I see that a question came in to define what authorized representative means. I realize we didn't do that early on. That does mean the third-party environmental contractor or consultant that the lender hires to help with the environmental reviews. So that is what we mean by authorized representative.

So here are the final steps in using the delegation. For MAP, the third-party consultant must enter the information and documentation directly into HEROS. For health care, we encourage consultants to enter the documentation directly into HEROs, but it is not yet required. And therefore, HUD also needs the information and documentation in the mortgage insurance application in section 2, third party report.

For both programs, HUD staff will review the materials, the documentation and the findings and then approve the review in HEROS. As Nancy mentioned, if the documentation is adequate or if HUD disagrees with the findings, HUD will enter consultation and complete the review. HUD will not issue a firm commitment for a project until Section 106 and all other parts of the HEROS environmental review are complete.

So most of you should be familiar with HEROS by now. Here's a screen shot of the start of the historic preservation page in HEROS. The page starts by asking whether a Section 106 review is required for your project. Pro tip: In most cases, the answer will be yes. Nancy is going to discuss no potential to cause effect memos and programmatic agreements in just a minute.

Here's further down on the HEROS page, and we are making updates to HEROS to add a checkbox where you can indicate that you are using the delegation memo. In the meantime, we need you to note that you are using the delegation memo in the text box that asks you to describe the process of selecting consulting parties and initiating consultation. So, you can see this box with the blue arrow. That's the box that we are talking about.

Here it is blown up. What we would like to do is use the standalone phrase "delegation memo" in this box so that we can run reports in HEROS. Please then follow that phrase with a more detailed statement, like what we have as an example in this box. And then follow that with specific details relevant to your project. And Nancy, will you please discuss the no potential to cause effects and programmatic agreements now?

Nancy Boone: Yes, thank you, Sara. So at the beginning of the presentation webinar, we mentioned several tools that may exempt projects from a standard Section 106 review. And Sara just pointed to this one as the first one on the initial historic preservation screening HEROS. If no potential to cause effect memos. These are issued by the Office of Environment and Energy when program activities are limited to things that have no or minimal physical effects, literally no or minimal physical effects. Memos are posted online on the HUD exchange at the URL that you see here.

And just by way of examples, if you go to that site, you will find several no potential to cause effects memos that relate to housing projects and financing. So there is one on to 223(f) that covers multifamily refinance transactions that do not exceed maintenance and that do not have reasonably foreseeable rehabilitation, new construction, or demolition as part of the project description.

There's one on to 223(f) that -- excuse me, no -- there's one on 223(a)(7) for the refinancing of properties constructed after 1975, where the no potential to cause effects memo applies to debt restructuring. In that memo, the -- there's an expiration date, since it refers to properties constructed after 1975, the memo expires in 2025, so that it may be reevaluated at that point.

The second thing on the list that may remove a project from needing a full standard Section 106 review is something that's included in HUD regulations under 24 CFR 50.19(B)(13). That regulation categorically excludes activities that do not require review under NEPA or related laws and authorities, including Section 106. And one of the exempted activities is maintenance.

There had been a lot of confusion and inconsistent interpretation of what maintenance means in the past, and so in 2016 HUD published a notice with guidance on how to interpret maintenance for environmental review purposes. Sometimes programs have their own definitions of maintenance for other purposes, but for environmental review purposes, this notice outlines what maintenance means and therefore what may be exempt.

So the maintenance notice gives general principles about what constitutes maintenance. Things like maintenance does not materially add to the value of a property or adapt it to new uses, or maintenance slows or halts deterioration. It also gives general examples. So cleaning or replacement of broken parts, preventative measures to preserve a building. And then it goes on to include a chart of specific activities that are considered maintenance and those that exceed maintenance and would be considered rehabilitation.

So here you see an excerpt from that chart that distinguishes between activities related to interior walls and ceilings. So patching and mending plaster, replacing stained ceiling tiles, painting and wallpapering, those are all maintenance activities and would not require Section 106 review. If they were more intensive, if you are installing new drywall or paneling and putting in a new ceiling, installing a drop ceiling, those things exceed maintenance under this definition in the notice and those activities would be considered rehabilitation and would be subject to Section 106.

Here's another example in the sections that address roof. So repairing a roof, repairing the flashing, repairing missing shingles or roof shingles is maintenance. But replacing a roof is rehabilitation, as is installation of solar panels. That exceeds maintenance.

For windows and doors, repairing windows, fixing windows, adding things like weather stripping. Those items are considered maintenance and would not be subject to Section 106. On the other hand, replacement of windows, replacement of doors, adding storm windows or doors would be rehab activities. You'll notice in the maintenance activities column there is a provision for replacing a single damaged or deteriorated window or replacing a vandalized entrance door. Those are things that do occur in properties that HUD wanted to account for those.

One thing to note, in order to be classified as maintenance and exempt from Section 106 review, all of the activities in a given project have to be ones that are classified as maintenance. You can't have a mix of maintenance and non-maintenance program activities and use the exemption for maintenance. If there are projects with mixed rehab and maintenance activities, the entire project is reviewed.

The third thing that was in that initial list that we mentioned was programmatic agreement. The HEROS screen asks, is this project subject to a programmatic agreement? There are five problematic agreements in effect right now that cover housing programs that would cover the programs in FHA financing for housing and health care that we're talking about today. So those states that have what we call Part 50 PAs for reference back to the Part 50 of our application of our regulations which cover FHA actions. Those states are Kansas, California, Alaska, Minnesota and South Carolina.

There is a programmatic agreement in process right now for Texas, and we're hoping that that will be in place soon. Many of the PAs that you might have seen or seen reference to are programmatic agreements that apply to other programs, not housing programs, programs that are reviewed under Part 58. So for instance, CPD, CDBG projects for public and Indian housing, public housing projects, those programmatic agreements are not available for housing programs. So, it's important that whatever the programmatic agreement is that you're referring to, that it covers the type of projects that you're undertaking.

So in this case, Part 50 programmatic agreements that would relate to housing and health care projects are limited to the size that are mentioned here on the slide, plus the impending six. I would just note that there is certainly interest out there across the country in doing more Part 50 programmatic agreements. And several states are contemplating that right now.

We are also working on a programmatic agreement that would be a single programmatic agreement for a state that would cover both Part 50 and Part 58 projects where individual municipalities could also sign on to that overall programmatic agreement. The programmatic agreements are negotiated with SHPOs and tribes and other consulting parties, and they include often a list of exempt activities.

So this is one of the major benefits of a programmatic agreement. They have lists of activities that do not require review. So you may find some refinancing activities that are listed as not

requiring review. So a programmatic agreement can take some of those rehabilitation actions, for instance, also, that were mentioned in the maintenance memo section, like in a programmatic agreement that extra step can be taken to eliminate the need for review, some of those rehabilitation-type activities as well.

So here you see some general overall provisions. And then typically there are lists of specific types of activities, often some from the rehab column and the maintenance notice that are not required for review. So here's one that includes financing and rehabilitation. Financing and rehabilitation of existing buildings less than 45 years old, with no ground disturbance unless the property is adjacent to or in a national register district or eligible district.

So there are many provisions in these programmatic agreements that would be helpful for the review of housing and health care projects. And right now, of course, these programmatic agreements did not anticipate the delegation that we're talking about today. So we will be working with the states that have programmatic agreements to amend those agreements to reference this lender delegation.

But in the meantime, with support from the advisory council, agreement from the advisory council, the lenders who are operating in the states where these programmatic agreements exist, they use the provisions of the programmatic agreements until we have a chance to do those amendments. And frankly, most of the programmatic agreements on that list of five are due for renewal in the coming year anyway.

So I think I'm going to hand it back to Sara to wrap up and move to questions. So Sara?

Sara Jensen: Great. Thanks so much, Nancy. So just a couple of other things before we get to questions. So next spring, HUD will run a report from HEROS on the use of the delegation memo and post this online. We will use the data from HEROS along with feedback, comments, and positive and negative outcomes to reevaluate the memo and make any necessary adjustments before reissuing. The current delegation memo expires at the end of December 2022.

So resources. We've mentioned throughout this webinar, the program guidance, we've also mentioned the training that we did last summer on Section 106, specifically for FHA projects. The links directly to that training was presented earlier. And we recommend that you view that if you haven't already. There's also a self-guided online training module. This is in the wiser set of modules on Section 106.

And there's lots of other information on HUD's historic preservation web page. And we've posted a link to that in the chat. And we've also posted in the chat a link to the MAP Guide. And you can see in the appendices, appendix A.9.2 the delegation memo. So the only difference -- well, one thing, it was posted without the final page by mistake. But the only other difference is that it is not signed. And so, you can begin using it when we post the signed version, which it will be posted in several places. It will be posted on the MAP page as a link directly there. It will also be posted on the housing preservation page, that the link is here and in the chat. And it will also be posted on Housing's environmental website.

Okay, we will take questions today on the delegation memo. Answers to general questions about Section 106 compliance can be found on the HUD exchange website that I just mentioned, and that's linked in your chat.

Multifamily housing is now using an ask a question portal for MAP questions and health care has long used the lean thinking mailbox. We'll answer as many questions on the delegation memo as we can today. If we don't get to your question or if you have follow-up questions, please submit that question via the ask the question portal for MAP or via lean thinking at HUD.gov for health care.

For multifamily housing, project-specific questions must go to the regional staff processing your application. So with that, let's go to your questions. And please make sure to address your questions to all panelists. Otherwise, we might miss your questions. So please make sure it goes to all panelists.

And Kris and Toni, let me just rearrange my screen a little bit. And we'll get started with any questions that have come in. Okay, here's a question. "Does the no potential to cause effect memo apply to Section 232 projects?"

So let me start and then, Nancy, you can add in any detail. So no, it does not at this point. The no potential to cause effects memo was written just for multi-family. However, as part of the updates to the 232 handbook, we will be working on a parallel no potential to cause effects that covers the 232 program. Nancy, anything to add?

Nancy Boone. No, that covers it.

Sara Jensen: Okay. Someone asked whether this presentation, PowerPoint will be provided to the attendees. I know that, Toni, you answered privately, but others may have that question. So John mentioned at the beginning that this is recorded and will be posted. So both the recording and the slides will be posted along with all of the other five webinars for the MAP rollout.

Okay. So a question is, "If a lender does not have an FHA number, no SHPO consultation can be prepared; correct?"

That is correct. Nancy, would you like to add to that?

Nancy Boone: No, I think it's a pretty straightforward answer. What we're seeing here is that this federal nexus for one of these projects, that's where a lender is going to use this delegation. The federal nexus is that assignment of the FHA number.

Sara Jensen: Okay, thank you. Okay, there are a couple questions about when is the 232 handbook anticipated to be updated? That is underway. I don't have a date to share.

There's a couple of questions about ground disturbance. So in an earlier slide, there was a reference made to significant ground disturbance that would trigger 106. What is the definition

of that and how much ground disturbance is significant or does it mean significant to have the potential to adversely affect?

We have that on a slide earlier. I'm not sure, Nancy, if there's anything to add, or if we've already covered that.

Nancy Boone: Well, I think that we talk about substantial ground disturbance, we talk about significant ground disturbance. I think that what we're -- we've used it in sort of two different ways. We've talked about substantial ground disturbance being something that triggers a need to consult with tribes. We have also talked about projects with substantial ground disturbance being ones that would require a qualified professional, namely an archeologist, probably, to evaluate whether there was a potential to affect archeological resources.

And in both of those cases, the spot has some examples of what significant or substantial means. And that's always a tough one. And, you know, it can vary in different locations, but hopefully the examples are useful for looking at a particular case and determining if something is substantial or significant in terms of ground disturbance.

Sara Jensen: Thank you, Nancy. There's a comment about a memo put out in Massachusetts, and I wonder if the person that put that in could clarify who put out that memo. Was that the SHPO? And I think that's something that we'll follow up outside of this webinar. But if you could please put in the Q&A a little follow-up on that, that would be helpful.

Okay, let's see. Okay, so there's a question: "To clarify, the tribal consultation must be completed by HUD prior to consultants contacting the SHPO with the delegation memo."

Nancy, do you want to take that one?

Nancy Boone: Sure. I think what we're saying very specifically is that the tribal consultation must be completed so that the lender can take into account any comments or concerns before reaching a final determination of a finding of effect and asking for concurrence from SHPO. So there may be instances, you know, before that, where a lender or their consultants may be interacting with the SHPO office. They may be, you know, looking at SHPO records about what may already have been identified as historic properties in the area, that kind of thing.

Sometimes there are informal relationships that come into play with sort of people being able to do informal earlier consultation before an official submission is made. That varies by state. I think that's the key point here is that any comments from tribes and other consulting partners have to be considered and reflected in the final finding of effect that the lender would make before they would go to SHPO with that finding of effect for their concurrence.

Sara Jensen: Thanks, Nancy. And thank you to the questioner who followed up and gave more details on that Massachusetts memo that we will get back with you separately.

Nancy, there was a question, I think following up on the comments you just made or perhaps earlier, can you address previously disturbed ground?

Nancy Boone: Yeah, so if an area has undergone previous ground disturbance, the question often comes up, is there still a potential for underground resources at that point or have they been disturbed by that ground disturbance if they had been there in the first place? So, looking at previous ground disturbance is something that we, you tell people, you know, you need to document this. It's not just a hunch.

You need to have information about the area that was disturbed, about the depth of the disturbance. And then that can be taken into account in assessing whether that area that was disturbed and how extensively it was disturbed might impact the potential of that site having archeological resources. So something that, you know, is factored into an assessment of whether a site has potential archeological resources.

Sara Jensen: Thank you, Nancy. And just to remind everyone that with the 2020 updates, there is a reference to the CPD memo that Nancy talked about -- I'm forgetting the number right now, Nancy, but that talked about tribal consultation and there's a link directly to that memo embedded in a footnote in MAP guide. So a lot of these questions will be answered by that notice and particularly Appendix A to that notice.

Okay, and then there was a question about when the delegation memo will be posted. So we're just getting it signed right now and then it has to go through some steps to get it posted. So there may be a couple of days delay. It may not be posted tomorrow, but as soon as possible, that will be posted. It will be posted both where the MAP guide is posted and will be posted on the historic preservation page and also on the housing environment website. So it is not yet posted, or maybe the draft is posted as an attachment, but that is not signed and still cannot be used [inaudible].

Nancy Boone: I want to make a comment on one of the previous questions, and we wouldn't comment on a memo from Massachusetts, but I would just say that one of the things that we want to get across is that HUD refinancing projects that entail some rehabilitation or some new construction or even demolition, those activities need to be aggregated with the refinancing transaction as the project that undergoes [inaudible]. So it's key to look at whether there are associated activities that would mean review in a refinancing process.

Sara Jensen: Yes, thank you. It must be aggregated together.

Nancy Boone: Yes.

Sara Jensen: Okay, it looks like the questions are slowing down, Kris, are there any that we have missed? For Toni?

Kris: I'm looking. I don't see the others that have come in yet. Oh, here's another one.

Sara Jensen: Okay, I'm seeing that one, Okay, so, yes, so for clarification, no SHPO determinations by third-party consultants can be submitted until the lender has received the FHA

number. That is correct. And you must include a copy of the delegation memo with your consultation request to the SHPO.

Okay, there's a question about if ground disturbance occurs as part of land grading and clearing as part of a larger master plan development several months ahead of FHA concept, the FHA sponsor has no controlling interest in activity, business activity, preemptive demolition.

Let me start and then I'll hand it over to Nancy. So in general, we have guidance on aggregation. It's in the MAP guide and we've also posted an FAQ with some examples. So you would aggregate your project following that guidance. And you don't necessarily have to include the entire planned urban development, but you do have to include the FHA site and directly related, like the parking lot and utility connections and things like that. So that would need to be included.

And there is the potential for anticipatory demolition, although that can be mitigated by prior legally binding contracts to do that work. But let me hand it over to Nancy to give a little more nuance on that.

Nancy Boone: Sure. Thanks, Sara. So I think here the question says that it's months ahead of FHA concept. And as Sara read earlier, the MAP guidance is that even before concept, if there is intentional adverse effect to potential historic property, you know, that can be considered anticipatory demolition. We don't generally see people, you know, purposely doing this. In fact, we almost never, ever see people purposely trying to avoid Section 106.

But sometimes what we do see is when the circumstances suggest that there was some, in this instance, for instance, ground disturbance before there's an actual application in the review, people sometimes raise the question, was this anticipatory demolition? Did people know that this should have been avoided, could have been avoided and may have harmed some important resource? In that case, HUD gets involved in sorting that out and, you know, asks for information on a timeline, for instance, and who had the power to prevent what or whether there was no power. So there -- if the question is raised, then we get involved in trying to look at the chronology and look at the impacts of the action and hopefully determine that it was not anticipatory [inaudible].

Sara Jensen: Thanks, Nancy. There's a question about the FHA number and timing. So the question is that HUD has -- other parts of HUD have requested that an FHA number not be requested until near the time of application. However, the number is needed for Section 106 processing. Should we request the FHA number early for Section 106 review?

So the reason that this delegation memo is tied to the FHA number is we needed a clear point where this wasn't just concept, it wasn't just sort of an idea. But there was a clear plan to apply for FHA mortgage insurance so that we're not doing extra consultation for projects that aren't going forward. So that's the thinking behind that line.

And I would say that, no, we don't want to have to change the timing necessarily because there's a lot of work to do before sending in the letter to the SHPO, so gathering information about the

project, gathering the clear photos, hiring the professionals that's needed to do the assessment on the site. So there's a lot of work that you can do without. And then and then you just see that FHA number before writing the SHPO.

And when there's tribal consultation also, then that pushes the timing back a little more. And so, in that case, maybe you would ask for it a little bit earlier than you would. But I think in general, we're not saying ask for it a year or six months early, but you want to time it with when you want to do the consultation. Nancy, anything to add?

Nancy Boone: No. No, I don't.

Sara Jensen: Okay. For clarification, lenders may choose to not wait for an FHA number and not use the delegation memo. Okay, I'm not totally following this question, but yes, that's true, if you elect not to use the delegation, then HUD staff would do the consultation and -- you still need that FHA number, though, to put in your application.

So I'm not totally sure if I'm following this last question.

Nancy Boone: I wonder if the person is asking if they have an option if they don't use the delegation memo, that they can just go ahead and [inaudible] and SHPO's [inaudible]. No.

Sara Jensen: Right, you broke up a little there, Nancy, but the answer would be no. If lenders do not choose to use that delegation memo, they cannot consult directly with the SHPO. They can do that early stuff we talked about, of outreach to gather information, to help identify historic properties. That's fine, but they cannot initiate consultation formally.

Okay. Well, this is great, we're slowing down on the questions and we're a little bit early, so I can give you all some time back in your day. And just a reminder that if you think of a question later or have a follow-up question, you can submit that through, ask a question for MAP or through lean thinking for the 232 handbook.

So John, do you think we should wrap up or stay on? Or let me know how you like to proceed?

John Panetti: Yep, we can go ahead and wrap up and get everybody about 10 minutes back with their day. That will conclude today's webinar. Thank you so much, everybody, for joining.

Sara Jensen: Thank you so much.

Nancy Boone: Thank you.

(END)